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231-445—66

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 354

JACK D. GAY, TRUSTEE FOR SHAREHOLDERS OF NORTHWEST URANIUM MINES, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–19a) is reported at 356 F. 2d 516.

### JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1966. On May 11, 1966, the Chief Justice extended until July 18, 1966, the time within which to file a petition for certiorari, and the petition was filed on July 15, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### QUESTIONS PRESENTED

1. Whether the Court of Claims erred in finding that the United States did not enter into any contract

to purchase uranium ore or uranium concentrate from petitioners.

2. Whether the Court of Claims erred in holding that the United States was not estopped to deny the existence of such a contract.

## STATEMENT

Petitioners brought this suit in the Court of Claims to recover the profits that they allege would have been realized had the United States purchased from Northwest Uranium Mines, Inc., ("Northwest") uranium ore or uranium concentrate which they contend the United States was contractually obligated to buy. The Court of Claims found that no such obligation had been incurred either by contract or by promissory estoppel; it therefore dismissed petitioners' suit. The facts, which we outline below, are not in dispute.

Under the Atomic Energy Act of 1946 (60 Stat.755, as amended, 42 U.S.C. 1801–1819 (1946 ed.)) the Atomic Energy Commission ("AEC") was authorized to encourage the development of a domestic uranium industry. In particular, the AEC was authorized to acquire uranium source materials and to "establish guaranteed prices for all source materials delivered to it within a specified time" (42 U.S.C. 1805(b)(5) (1946 ed.)) Pursuant to that authority, in 1948 the AEC announced (Circular 1, 10 C.F.R. § 60.1 (1949 ed.); Circular 5, 10 C.F.R. §§ 60.5, 60.5a (1958 Supp.); Pet. App. 25a-35a) guaranteed minimum prices for specified grades and types of uranium bearing ores delivered to the AEC in specified quantities. With the exception of a provision in Circular 5 (10 C.F.R. § 60.5(d)) which dispensed with the need for

written contracts for small sellers delivering less than 1,000 tons of ore per year, both Circular 1 and Circular 5 expressly required the execution of formal contracts covering all sales at the established prices. In addition, the AEC announced its willingness both to establish ore-buying schedules for mills producing uranium materials not covered by Circulars 1 and 5 and to negotiate contracts for the construction and operation of ore-concentrating mills (Pet. App. 35a–36a). In numerous public announcements the AEC stressed its desire to foster the development of privately owned uranium milling facilities by limiting its direct purchases of uranium ores and focusing its procurement on uranium concentrates sold by such mills pursuant to negotiated contracts (Pet. App. 24a, 37a–38a). Finally, the AEC undertook to provide a variety of incentives, including various bonuses and free assaying services, designed further to stimulate the search for domestic uranium ores (Pet. App. 7a). This program proved highly successful: domestic ore reserves increased from 1,000,000 tons in 1948 to 63,000,000 tons in 1956 (Pet. App. 43a–44a).

In 1955, Northwest began prospecting for uranium on the Spokane Indian Reservation in Washington. On December 10, 1955, Northwest wrote to the manager of the AEC office at Grand Junction, Colorado, asking if Northwest could "enter into negotiations" with the Commission for a contract under which Northwest would have its ore processed by another mill and then sell the concentrate to the AEC (Pet. App. 8a–9a; 53a–54a). The AEC replied that its

procedure was "to consider detailed proposals submitted by private companies for the construction and operation" of processing plants, and that the Commission purchased concentrates meeting required specifications only "under the terms of negotiated contracts" (Pet. App. 9a; 54a–56a).

During the ensuing two years Northwest engaged in exploratory drillings which established that its property contained more than 600,000 tons of relatively low-grade ore (Pet. App. 10a). Northwest considered upgrading its ore by converting it to a "slurry" which could then be further refined by existing mills holding concentrate contracts with the AEC (Pet. App. 11a). Northwest discussed the feasibility of such further processing with the Dawn mill in Spokane and the Vitro mill in Salt Lake City—both of which had concentrate contracts with the AEC under which at least 25 percent of their processing capacity had to be made available to independent producers. These discussions proved unfruitful (Pet. App. 64a).

On July 13, 1957, Northwest wrote to the AEC that it wished "to enter into negotiations" for a contract for the construction of its own "concentrator plant" (Pet. App. 64a–67a). As Northwest's letter acknowledged, the proposal it submitted failed to satisfy the AEC's usual contract requirements in at least three respects: (1) the proposed plant would produce a low-grade concentrate which would have to be "processed further in an existing mill"; (2) the ore reserve would permit only a four year operation; and (3) the plant would not accom-

modate ore from other sources (Pet. App. 11a–12a).[1]

Between July 13 and October 9, 1957, Northwest "doggedly pursued AEC procurement officials," who advised that they had not reviewed the proposal because they were re-examining the entire procurement policy in light of the increased supply of uranium reserves; however, the manager of the AEC office at Grand Junction, Colorado, suggested that Northwest submit a more detailed proposal (Pet. App. 12a, 68a–70a). On October 9, 1957, Northwest submitted more detailed "back-up" information on this proposal, as well as a "rough estimate" for a supplementary proposal designed to produce a "high grade product" (Pet. App. 67a–68a, 70a–74a).

On October 28, 1957, the AEC announced that, because of the increased uranium production, it would limit commitments for additional domestic uranium production but (Pet. App. 13a, 45a–46a):

> * * * Proposals for domestic contracts which already have been submitted and are under review still will be considered in the light of the discussions which have taken place. In some instances these discussions were initiated a year or more ago.
>
> * * * * * *

[1] The AEC's concentrate or mill contracts were for complete rather than partial processing of the ore and were awarded only if there were at least a 5-year ore reserve. (On February 1957, this was increased to a 10-year reserve. Pet. App. 44a.) The contracts also required that the mills process ore produced by [redacted] independent miners (Pet. App. 39a–40a).

> * * * If new contracts are considered, preference will be given to providing a limited market for areas having no present milling facilities.

In line with this policy, no further consideration was given to Northwest's proposal (Pet. App. 12a–13a, 74a–75a). Thereafter, in March 1958, Northwest's assets were sold to petitioner Silver Buckle Mining Co., and in June 1958, Silver Buckle arranged to sell ore to Dawn (Pet. App. 76a). In March 1960 Silver Buckle transferred its leases and mineral rights to Dawn for approximately $1,000,000 (Pet. App. 78a).

Petitioners urged before the Court of Claims (1) that the AEC had made, and petitioners had accepted, a "continuing offer" either to purchase all amenable uranium-bearing ores which could be processed economically or to "formalize a uranium concentrate contract"; and (2) that the AEC, having induced substantial performance by petitioners, should be estopped to deny the existence of a contract for the purchase of ore or concentrate. The Court of Claims rejected each of these contentions, holding (1) that the AEC had made no "continuing offer" (Pet. App. 13a–15a); (2) that petitioners had not accepted any offer (Pet. App. 15a–17a); and (3) that the AEC was not estopped to deny the existence of a contract with petitioners (Pet. App. 17a–19a).

## ARGUMENT

The decision of the Court of Claims is correct and is not in conflict with the relevant precedents. The issues raised by the petition turn on the particular

facts of the case and lack general significance. Accordingly, no reason appears for this Court to review the decision of the court below.

1. Petitioners conceded before the Court of Claims that Northwest's ore was not of the type for which the AEC established a minimum price in Circular 5 (Pet. App. 15a). The court also found that Northwest's concentrate was clearly not of the type comprehended by Circular 1 (*ibid.*). Thus, even if Circulars 1 and 5 constituted offers, they were not offers to buy what Northwest had to sell. Petitioners urge, however, that a broader offer may be inferred from the AEC's entire procurement program, designed as it was to encourage uranium prospecting, mining and refining. The court found that in attempting to marshal a collection of AEC regulations, practices, customs and press releases into a broad offer to buy all amenable uranium ores, irrespective of type or location, petitioners were "attempting to make the whole equal to a good measure more than the sum of its parts" (Pet. App. 14a). The very specificity and detail of Circulars 1 and 5 strongly negate the suggestion that the AEC's acquisition program as a whole should be read as a blanket offer to buy.

Whether or not the AEC undertook to maintain a market for domestic uranium, petitioners overlook but do not deny the fact that the AEC did in fact maintain such a market—in part by buying uranium-bearing ores and, more significantly, by contracting to buy the output of concentrating mills which in turn bought ore from independent miners. Indeed, the ore which Northwest found and subsequently transferred to

Silver Buckle for $2,500,000 (Pet. App. 76a) was sold, starting in July 1958, to the Dawn mill where it was processed pursuant to Dawn's contract with the AEC (Pet. 36; Pet. App. 76a–77a). Moreover, Silver Buckle received various production and quality bonuses pursuant to AEC regulations (Pet. App. 77a). Petitioners' contention, therefore, comes down to the proposition that the AEC offered either to buy all ore that might be tendered or to accept any mill contract that might be proposed. That proposition is not only inherently implausible but, as the court below found (Pet. App. 13a–15a), is not supported by the record.

2. Even if it were supposed that the AEC made a continuing offer as petitioners suggest, nothing that Northwest did constituted an acceptance. Northwest never tendered to the AEC, and was never in a position to tender, ore of the types specified in Circulars 1 and 5.[2] Here, as in *Radium Mines* v. *United States*, 153 F. Supp. 403, 406 (Ct. Cl.), on which petitioners rely, "plaintiff did not have ore available which satisfied the conditions of the Government's offer to purchase; hence, no contract * * * arose."

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[2] Northwest's letter of July 13, 1957 (Pet. App. 64a–67a), which petitioners suggest (Pet. 36) constituted a tender of ore, reflected a price substantially higher than that set forth in Circular 1 (Pet. App. 26a). Nor was Northwest's ore of the "carnotite-type or roscoelite-type * * * of the Colorado Plateau area" as specified in Circular 5 (Pet. App. 29a). The fact that the AEC subsequently purchased uranium refined from the ore by Dawn does not show, as petitioners urge (Pet. 36), that the AEC sought *unrefined* ore of the type Northwest had or that the tender of such ore constituted an acceptance of any offer.

Nor did Northwest attempt to avail itself of the private market which the AEC created for uranium ore by its contracts with milling companies such as Dawn.[3] Northwest never attempted to sell its ore to Dawn or any other private milling company, but rather sought, fruitlessly as it turned out, to improve its economic return by offering Dawn an upgraded slurry which would have necessitated alterations in Dawn's milling facilities (Pet. App. 62a–64a). Nor can a contract be derived from Northwest's proposal of October 9, 1957, containing a "rough estimate" of the costs anticipated in the construction and operation of a new mill (Pet. App. 70a–73a). As the court below found, Northwest's proposal "was one that would have required extensive investigation and consideration * * * and several months of negotiation * * * before the terms and conditions of a uranium concentrate or mill contract could have been reached between the AEC and Northwest, if at all" (Pet. App. 75a). In this respect Northwest's position was altogether different from that of the plain-

[3] As previously indicated, the AEC generally required mills to use part of their capacity to treat the ores of independent producers (Pet. App. 35a–36a, 39a). Once such milling facilities were opened, the AEC closed its buying facilities in the area (Pet. App. 37a–38a). These practices were publicly announced and constituted common knowledge in the uranium industry (Pet. App. 38a). Here, the Dawn Mining Company had opened a mill in the area of Northwest's deposits; and that mill was required to treat the ores of independent producers, as well as Dawn's own ores (Pet. App. 61a). This too was a matter of public knowledge. In the AEC's negotiations with Dawn for the construction of the mill, Northwest's leased reserves had been looked to as a source of custom (Pet. App. 60a).

tiff in *Himfar* v. *United States*, 355 F. 2d 606 (Ct. Cl.) Himfar had not merely located ores of the kind and quality sought under the government's domestic manganese purchase program, but he had also developed the mine and had extracted, delivered and been paid for hundreds of tons of ore when the government unreasonably suspended his authorization to participate in the program.

3. The court below was also correct in refusing to hold the government liable to petitioner under the theory of promissory estoppel. See A.L.I., *Restatement of Contracts*, Section 90. It is doubtful that that doctrine is applicable to the government. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409. Nor does it appear that under 28 U.S.C. 1491 the United States has consented to be sued on contracts that are neither express nor implied in fact. See *Alabama* v. *United States*, 282 U.S. 502, 506; *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287, 293. In any event, as the court below held (Pet. App. 18a), Northwest's efforts were not prompted by a "formal promise to buy *all* uranium regardless of mining and processing difficulties, and any informal promise was not sufficiently broad to comprehend plaintiffs' reliance." Finally, as the court below also held (Pet. App. 18a), this is not a case in which a promise must be enforced to avoid injustice. Petitioners embarked on the risky business of prospecting in the hope—not the certainty—of making a sale. They do not claim that they suffered any loss; they claim only the profits

which they anticipated. Indeed, so far as the record shows, they made a substantial profit on their investment (Pet. App. 50a–52a, 76a–78a). No injury appears for which petitioners must be compensated in the interests of justice.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 354

JACK D. GAY, Trustee for Shareholders of Northwest Uranium Mines, Inc., Et Al., *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

**On Petition for a Writ of Certiorari to the Court of Claims of the United States**

## REPLY BRIEF

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## REPLY BRIEF

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Petitioner accepts respondent's characterization of this case as "turn[ing] on [its] particular facts," but emphatically disagrees with its conclusion that it therefore "lacks general significance." (R. Br. 6-7).

Granted that the facts here are unique and novel; this does not, however, negative the fact that the *principles* involved herein are of more than "general significance" and extremely important for all persons who deal with the government, since the principles involved go to the very heart of the government's contractual relations with its citizens. (Such contracts approximating $70,000,000,000 per year. See Vol. 52, No. 9, ABA Journal, p. 884). The unfair if not unethical practices apparent to even a cursory viewer of this case are unfortunately typical of government contracting practices and require this Court's scrutiny to assure that they do not continue.

Petitioner regrets the necessity of having to add this Reply to an already excessively long petition.[1] However, respondent's brief contains numerous misstatements and ignores considerable evidence contrary

[1] It is not simply petitioner's verbosity which causes the Petition and Reply to assume such length proportions. Rather, the nature of review of Court of Claims cases itself is in large part responsible. This Court, as it is well aware, must not only act as a Supreme Court in cases coming from the Court of Claims—it must also assume part of the functions normally assumed by a federal court of appeals. Lacking court of appeals review of a case and therefore the narrowing of issues and record by such review, petitioner must attempt to "make its case" in the petition for certiorari to a greater degree than if court of appeals review of the case were provided. Moreover, the petitioner must work with an unwieldy record which necessitates in turn incorporation of more material into the petition. Further, the fact that this Court in effect serves as both a court of appeals and a Supreme Court of the Court of Claims lays upon it a greater duty to review Court of Claims cases since many of the legal responsibilities of the government are determined in the Court of Claims and, without frequent review by this Court, the Court of Claims becomes a Supreme Court unto itself in clear contravention of the Constitution.

to its position and the decisions of the Court of Claims.[2] Petitioner therefore is compelled to point out this additional evidence to the Court so that it may fully appreciate why it is so important that certiorari be granted in this case. Petitioner respectfully proffers the following rebuttal of respondent's arguments, considering them in the order in which they appear.

1. At the bottom of page 2 and at the top of page 3, respondent attempts to assert by implication that Circular 5 applied only to the Carnotite and Roscoelite type ores of the Colorado Plateau area and if different types of ores were found in other areas, only the Circular 5 prices were expanded to cover these ores and not the other guarantees embraced in the Circular.[3] The respondent is saying that the guaranteed market applied only to the specific ores and area described in

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[2] Respondent fails to allude to the fact that many of the findings of the Court of Claims are patently "clearly erroneous" on their face. Although respondent does not specifically allude to the question, apparently it is relying upon a "substantial evidence" standard of review before this Court. Petitioner submits that the Court's power of review in this case is not so narrowly circumscribed and is more properly founded upon the more liberal "clearly erroneous" rule applicable to federal district courts (Rule 52(a) FRCiv.P) in reviewing decisions of the Court of Claims than the "substantial evidence" rule applicable to administrative agencies. See Stern and Gressman, *Supreme Court Practice*, § 2-19, p. 55 (3rd ed.).

[3] Respondent also asserts at page 8, note 2 that petitioner's ores were not "carnotite or roscoelite-type . . . [ores] of the Colorado Plateau area" as described in Circular 5. No one has ever contested this fact. What respondent ignores is the fact that the evidence in the case conclusively and overwhelmingly proves that the respondent, by practice and custom, extended the provisions of Circular 5 to *all* uranium bearing ores whether of the Colorado Plateau carnotite or roscoelite type or not. See evidence set out, *infra*, note 4.

Circular 5 and that as other ores were found in different areas, the Government would then establish the price schedule. This is not correct. The market did not follow the discoveries; rather, the Government established the guaranteed markets in order to induce private enterprise to join in the search for uranium ores. The guaranteed market *preceded* rather than followed the discoveries. That this is true is readily apparent from a review of the public addresses catalogued at Appendix B of the petition. Additionally, the evidence of record in this case conclusively proves that the guaranteed minimum price for uranium bearing carnotite and roscoelite-type ores of the Colorado Plateau area set forth in Circular 5 was extended by administrative practice, policy, and custom to provide a guaranteed minimum price for all uranium-bearing ores economically and metallurgically amenable to treatment irrespective of the type of ores involved or the geographical location of the uranium deposit. Petitioner herein sets out in the margin just some of the record evidence in this case proving this assertion and it respectfully submits that the Court of Claims' determination to the contrary is "clearly erroneous."[4]

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[4] This evidence includes the following:

1. The initial purpose of the AEC in applying the terms and conditions of Circular 5 to the ores of the Colorado Plateau area was because these were the only known ore reserves in the United States; the chances for further discoveries for such ore deposits would more likely be in the same general area; there were known metallurgical processes that could accommodate the Plateau ores; and as a result of the Manhattan Project the cost of producting such ores was known to the Commission. (Tr. 1304)

2. As the uranium procurement program was extended all over the western United States, there definitely were no uranium

2. Respondent states at pp. 3-4 that the AEC obligated itself to purchase ores or concentrate only through "negotiated contracts." Respondent thereafter denies that the AEC entered into any negotiations with petitioner and thus no contract was ever formulated for the Court of Claims to enforce. Petitioner grants that no formal written contract was ever entered into between the parties. However, this was not the fault of petitioner nor is it petitioner's theory that such a formal contract existed. It is petitioner's theory that, based upon the *conduct* of the parties, an implied in fact contract came into existence. Respondent should not now be heard to complain that no formal contract was ever finally negotiated, since it was its conduct in refusing to conclude negotiations that prevented the formal contract from coming into existence. This is made clear by reference to the conduct of the AEC throughout this case, as catalogued by petitioner in its petition (pp. 14-28). Moreover, although the public announcements of the AEC stated that purchases of ores and concentrate would only be made through "negotiated contracts," it never pre-

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minerals that the AEC would not pay Circular 5 prices for. (Tr. 1310.)

3. The "Colorado Plateau area" referred to in Circular 5 was never defined by any AEC representative nor did such a definition ever appear in any official AEC publication. (Tr. 850; 1298-99). As of 1959, there were 23 uranium processing mills in operation, 16 of which were processing ores other than carnotite-type or roscoelite-type ores and were not located on the Colorado Plateau. (Tr. 924-25).

4. Circular 5 prices were applied to all AEC-mill contracts so that all uranium mills purchasing custom ore from independent producers were required by the terms of their contracts with the AEC to pay not less than Circular 5 prices for ores, many of which were not carnotite or roscoelite-type ores and which were not from the Colorado Plateau area. (Tr. 1538-39.)

scribe specifically the "formalities as to the terms or type of contracts necessary to establish valid and enforceable obligations." (Pet. 22a). It did, however, establish by custom and practice *informal* procedures whereby contracts would be entered into. Such informal procedure was initiated by the submission of a formal and detailed "proposal" by the prospective mill owner. Mr. Johnson, who certainly was in a position to speak authoritatively, stated that he considered petitioner's July 13, 1957 submission a "proposal" in the formal sense of that word. (Jt. Ex. A, Item 13; P. Ex. 64; Tr. 1574) Mr. Jones was aware at the September 23, 1957 meeting of the fact that petitioner had the finances, the mill site, ore reserves and all other matters necessary to negotiate a formal uranium concentrate contract. (Pet. p. 26). Clearly the October 9, 1957 "submission" was considered to be a concrete proposal by Mr. Johnson. (Jt. Ex. A, Item 13; P. Ex. 64; Tr. 1574). Mr. Porter, who had previously negotiated such contracts with the AEC stated that in his opinion the October 9, 1957 proposal was complete and there would have been no difficulty in arriving at negotiations from that submission. (Tr. 457, 487-94; 945-46). Mr. Jones testified in substance that if there were anything wrong with a submitted contract, upon examination of the contract and discovery of such by the AEC, the applicant would be advised as to the defects in his proposal so that they might be cured. (Tr. 1099a; 1451-52). The AEC never criticized the petitioner's proposal nor did it ever formally or informally reject it. It simply sat on it.[5]

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[5] The rules of the Administrative Procedure Act, 5 U.S.C. §§ 101-11 (1949) apply to the AEC. (42 U.S.C. 2231). Section 6(d) of the Act provides in part:

> "Prompt notice shall be given of the denial in whole or in part of any written allegation, petition, or other request of

Respondent, in an *ex post facto* attempt to shore up the court's decision, asserts at pp. 4-5 that petitioner's proposal of July 13, 1957 did not meet AEC requirements in three respects:

> "(1) the proposed plant would produce a low-grade concentrate which would have to be 'processed further in an existing mill'; (2) the ore reserve would permit only a four year operation; and (3) the plant would not accommodate ore from other sources (Pet. App. 11a-12a)."

In the first place, since the AEC never objected to any of the specifics of petitioner's proposal, the respondent should not now be heard to interpose such objections. The Court of Claims has previously held that the government is estopped from asserting in court reasons for cancellation other than those reasons previously assigned. *David J. Joseph Co.* v. *United States,* 82 F. Supp. 345 (Ct. Cl. 1951). By a parity of reasoning, if the AEC had no criticism of the proposals submitted by Northwest on July 13 and October 9, 1957, it should not now be allowed to attempt to assert a criticism of them. However, even if respondent's *ex post facto* criticisms are entertained it is clear that they stood as no bar to the final formalization of a contract.

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any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accomplished by a simple statement of procedural or other grounds."

The AEC's failure to notify petitioner in writing of its action in regard to petitioner's written proposal is in clear violation of this provision of the Act. It is also in clear violation of the administrative custom and procedure established by the AEC. Moreover, it is difficult in the extreme to see how the speech of October 28, 1957 announcing a policy change could be construed as a rejection of a formal "proposal." Such an interpretation makes a mockery of the Administrative Procedure Act and normal accepted business practices.